Mae Bina Sdn Bhd v Chee Kie Chong

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 03-50 OF 1989
ABDUL HAMID OMAR LP, MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
19 AUGUST 1991

Civil Procedure — Appeal — Appeal against order made in chambers — Application for further arguments — Application dismissed and certificate of no further argument issued — Requirements for bringing appeal from order made in chambers — Validity of certificate of no further argument — Rules of the High Court 1980, O 56 — Rules of the Supreme Court 1980, r 56(a) — Courts of Judicature Act 1964, s 68(2)

Civil Procedure — Further arguments — Order made in chambers — Application for further arguments — Made out of time — Application dismissed — Certificate of no further argument issued by judge — Validity of certificate — Time for applying for further arguments — Courts of Judicature Act 1964, s 68(2) — Rules of the High Court 1980, O 56 r 2(2)

In this case, the respondent claimed various sums for work done as interior decorator at the request of the appellant in its housing project and for retention moneys retained by the appellant. On 22 April 1987, the respondent obtained summary judgment for the sums claimed against the appellant. On appeal to the High Court judge-in-chambers, the order was varied on 3 September 1988 by giving the appellant conditional leave to defend on payment into court of a sum of $132,000 within two weeks. The appellant failed to comply with the condition and final judgment was entered on 2 October 1988 in favour of the respondent. The appellant then appealed against the conditional leave order and on 29 January 1989, applied for further argument in respect of the order. The learned judge dismissed the application and at the same time pronounced his decision to issue a certificate of no further argument. Counsel for the appellant received a copy of the certificate on 7 April 1989. An appeal was brought to the Supreme Court.

Held, dismissing the appeal:

(1) Under s 68(2) of the Courts of Judicature Act 1964 and O 56 r 2(2) of the Rules of the High Court 1980 read together, no application by any party for further argument whether orally or in writing can be entertained by the court after the expiry of four days from the date of the order made in chambers. In this case, the appellant's application for further argument was not made within the four-day period and the learned judge should have dismissed the application.

(2) Rule 56(a) of the Rules of the Supreme Court 1980 clearly provides, in the case of an appeal from an order made in chambers, that no appeal except by leave of the full court shall be brought after the expiration of one month from the date when such order was pronounced or after the issue of a certificate of no further argument, whichever is the later or when the appellant had notice of it.

(3) In this case therefore, the only way this appeal could have been maintained was for the appellant to apply for leave to appeal in lieu of the certificate, within one month of the order made in chambers. Since the appellant failed to do so, the appeal could not be maintained and must be struck out and dismissed with costs.

[Bahasa Malaysia summary

Di dalam kes ini, penentang telah menuntut bayaran untuk kerja yang dibuat sebagai penghias bahagian dalam rumah atas permintaan perayu dan juga jumlah wang yang ditahan oleh perayu di bawah perjanjian itu. Pada 22 April 1987, penetang telah mendapat penghakiman terus bagi jumlah wang yang dituntut terhadap perayu. Apabila rayuan dibuat ke hakim Mahkamah Tinggi dalam kamar, perintah itu telah diubah pada 3 September 1988 dengan memberi perayu kebenaran bersyarat untuk membela, dengan syarat ia membayar $132,000 ke dalam mahkamah dalam masa dua minggu. Perayu tidak mematuhi syarat itu dan penghakiman muktamad telah dicatatkan bagi pihak penentang. Perayu kemudiannya membuat rayuan terhadap perintah kebenaran bersyarat untuk membela dan pada 29 Januari 1989 memohon membuat hujah lanjut mengenai perintah itu. Permohonan itu telah ditolak oleh hakim yang arif dan beliau juga mengumumkan keputusannya untuk mengeluarkan perakuan bahawa hujah lanjut tidak diperlukan. Peguam bagi pihak perayu telah menerima salinan perakuan itu pada 7 April 1989. Rayuan telah dibuat ke Mahkamah Agung.

Diputuskan, menolak rayuan itu:

(1) Di bawah s 68(2) Akta Mahkamah Kehakiman 1964 dan A 56 k 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 dibaca bersama, tiada permohonan oleh mana-mana pihak untuk hujah lanjut sama ada secara lisan atau bertulis boleh dipertimbangkan oleh mahkamah selepas empat hari dari tarikh perintah yang dibuat di dalam kamar itu. Di dalam kes ini, permohonan perayu untuk hujah lanjut itu tidak dibuat dalam masa empat hari itu dan hakim yang arif sewajarnya harus menolak permohonan itu.

(2) Kaedah 56(a) Kaedah-Kaedah Mahkamah Agung 1980 dengan jelas memperuntukkan bahawa di dalam kes rayuan dari perintah yang dibuat di dalam kamar, tidak ada rayuan, kecuali dengan izin mahkamah penuh, boleh dibawa selepas satu bulan dari tarikh perintah itu dilafazkan atau selepas pengeluaran perakuan bahawa hujah lanjut tidak diperlukan, yang mana yang lebih lewat atau apabila perayu mendapat tahu mengenainya.

(3) Di dalam kes ini, cara tunggal bagi perayu untuk membawa rayuan ini ialah perayu hendaklah memohon mendapat izin untuk merayu sebagai ganti perakuan itu dalam masa sebulan dari perintah yang dibuat di dalam kamar. Oleh kerana perayu tidak membuat demikian, rayuan tidak boleh dibawa dan rayuan hendaklah ditolak dengan kos.]

Cases referred to

1 *Hamzah bin Abdul Majid & Anor* v *Sungei Way Leasing Sdn Bhd* [1986] 1 MLJ 471 (folld)
2 *Tractors (M) Bhd* v *Southern Estates Sdn Bhd & Anor* [1984] 1 MLJ 118 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 68(2)
Rules of the High Court 1980 O 14, O 56 r 2(2)
Rules of the Supreme Court 1980 r 56(a)

Appeal from: Suit No 23-98 of 1986 (High Court, Kuala Terengganu)

Thangaraj Balasundram (*Joseph Loo* with him) for the appellant.

Ong Siew Wan for the respondent.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): The respondent's claim against the appellant was for the sum of $131,331.59 for work done as interior decorator at the request of the appellant in its housing project. He also claimed $22,267.93 being retention moneys retained by the appellant in respect of work carried out at Taman Teratai, Kuala Terengganu.

On 22 April 1987, the respondent applied and obtained from the senior assistant registrar ('SAR') of the High Court in Kuala Terengganu, a summary judgment against the appellant for the two sums claimed. The SAR was of the view that the only two issues before the court were not triable, namely, whether the appellant company had requested for the interior decoration services and if so, whether the said services had been rendered. The SAR accepted a letter dated 26 August 1986 written by Encik Abdul Rahim bin Hj Mohd in his capacity as the project manager of the appellant company at the relevant time, as an admission of liability by the appellant, and rejected the defence contention that Encik Abdul Rahim bin Hj Mohd had no authority to sign the letter.

The appellant had appealed against the SAR's decision to the High Court judge-in-chambers, who on 3 September 1988 varied the O 14 judgment by granting conditional leave to defend to the appellant on payment into court of a sum of $132,000 within two weeks. Originally, neither party had appealed against the order of conditional leave, but when the appellant failed to comply with the condition imposed and a final judgment was entered on 2 October 1988 in favour of the respondent, it was only then that the appellant decided to appeal against the conditional leave order of 3 September 1988. On the hearing of the appellant's application for further argument on 29 January 1989 in respect of the conditional leave order, the learned judge dismissed the application and at the same time pronounced his decision to issue a certificate of no further argument in the presence of Encik K Nadarajah, counsel for the appellant, and Encik Andrew Wong, counsel for the respondent. Subsequently, on 7 April 1989, Encik Nadarajah received a copy of the certificate dated 29 January 1989. According to the learned judge, the time for appeal started to run from 29 January 1989 and not from 7 April 1989. If so, then the notice of appeal filed on 18 April 1989 was out of time under r 56 of the Rules of the Supreme Court 1980. In our view, in the case of an appeal from an order made in chambers, r 56(a) clearly provides that no appeal shall, except by leave of the full court, be brought after the expiration of one month from the date when such order was pronounced *or* after the issue of certificate of no further argument, whichever is the later *or* when the appellant first had notice of it. In the present case, the appellant through its counsel knew of the issue of certificate when it was ordered by the judge on 29 January 1989. In the circumstances, the learned judge was correct in holding that the one-month period limited for appeal should commence from 29 January when the appellant's counsel first had notice of it, and not from 7 April 1989 when he physically received a copy of the certificate.

However, the fundamental issue that arose in this case was the validity of the certificate itself and consequently the propriety of the appeal before us in the absence of leave to appeal under s 68(2) of the Courts of Judicature Act 1964.

Purporting to act under the certificate of no further argument dated 29 January 1989, the appellant filed a notice of appeal on 18 April 1989 against the order of the High Court given on '29 January 1989'. There was undoubtedly an error in the notice, because the only decision made on that date was the granting of the impugned certificate of no further argument on which the appellant was relying to maintain the appeal. There is now a fresh motion before us filed by the appellant to amend the notice of appeal by substituting the date of '3 September 1988' for the date '29 January 1989'. The appellant obviously did not intend to appeal against the order granting a certificate of no further argument nor against the final judgment of 2 October 1988; but it was dissatisfied with the order made in chambers which allowed it conditional leave only instead of unconditional leave to defend. Notwithstanding the contemporaneous letter of admission of liability by its project manager, Encik Abdul Rahim bin Hj Mohd, the appellant persisted in maintaining the stand that it was entitled to unconditional leave to defend.

Be that as it may, what was crucial here was not the inane error in the date mentioned in the notice of appeal, which could perhaps be mercifully remedied by an amendment. The problem arose from the indisputable fact that the appellant's application for further argument was not made within the four-day period as required by s 68(2) of the Courts of Judicature Act 1964 read with O 56 r 2(2) of the Rules of the High Court 1980 ('RHC'). These provisions state:

> 68(2): No appeal shall lie from an order made by a Judge of the High Court in Chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Supreme Court or from a Judge of the High Court.
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> O 56 r 2(2) RHC: Any party dissatisfied with any order made by a Judge in Chambers may apply, at the time the order is made, orally or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into Court for further argu-

ment, and on such application, the Judge may either adjourn the matter into Court and hear further argument, or may certify in writing that he requires no further argument. If the Judge hears further argument, he may set aside the order previously made and make such other order as he thinks fit.

In *Hamzah bin Abdul Majid & Anor* v *Sungei Way Leasing Sdn Bhd,*[1] a summary judgment had similarly been given by the SAR. The appeal to the High Court was dismissed in chambers. No oral application was made for further argument, but a written application was subsequently made out of time by about 20 days. On a preliminary objection that the appeal was not properly brought before the court, Syed Agil Barakbah SCJ observed at p 473:

> It is clear therefore that the application was made out of time and we are of the view that had the learned judge been aware of the defect he would not have issued the certificate.

On close reading of s 68(2) and O 56 r 2(2) together, we are of the view that no application by any party for further argument whether orally or in writing can be entertained by the court after the expiry of four days from the date of the order made in chambers. The High Court has no jurisdiction to issue a certificate when the application was made out of time. It is mandatory that a party who wishes to take advantage of the further argument provision should apply either orally at the time the order in chambers is made, or in writing at any time within four days from the date of the order.

On 3 September 1988, the appellant's counsel was absent when the order-in-chambers granting conditional leave to defend was made, thereby making it quite impossible for him to apply for further argument orally. The decision was conveyed to him by the respondent's counsel by letter dated 5 September. He should have applied in writing within four days from the date of that order but, for some reason, that was not or could not be done. The next step ought to be an application for leave under s 68(2). Again that was not done. Instead, the written application by summons-in-chambers for further argument was made about 25 days out of time which the learned judge had no jurisdiction to entertain. According to the grounds of judgment of the learned judge, the summons-in-chambers was filed on 2 October 1988 to apply out of time for the adjournment of the matter in court for further argument. Obviously the learned judge had overlooked the fact that he had no jurisdiction to entertain the application. Had it been otherwise, he would certainly have dismissed the summons-in-chambers in limine. Since 'the four-day rule' had been breached, the certificate of no further argument issued on 29 January 1989 was undoubtedly null and void and of no effect.

In *Tractors (M) Bhd* v *Southern Estates Sdn Bhd & Anor,*[2] the Federal Court held at p 120:

> But in truth there is no conflict at all between s 68(2) and r 56(a). Section 68(2) deals with non-appealable matters whereas r 56 governs the time limit for filing notice of appeal. An appeal against an order in chambers to the Federal Court is not properly brought unless, firstly, the case is appealable under s 68, and secondly, the notice of appeal has been filed within the time prescribed by r 56(a). The order is only appealable if the aggrieved party has fulfilled one of the conditions imposed y s 68(2).

On the particular facts of the present case, the appellant had complied with none of the prerequisites imposed by s 68(2). There was a chain of errors in the prosecution of this appeal. The only way this appeal could have been maintained was for the appellant to apply for leave to appeal in lieu of the certificate, within one month of the date of order made in chambers, irrespective of the value or nature of the respondent's claim. On 2 October 1988, instead of applying for further argument out of time, the appellant was then still within time to apply for leave to appeal from the High Court under s 68(2). Since the appellant had failed to do so, we regretfully found that the present appeal could not be maintained and we accordingly ordered it to be struck out and dismissed with costs. We also ordered that the deposit be paid to the respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *Zainuriah & Thangaraj; Andrew Wong & Co.*

Reported by *Prof Ahmad Ibrahim*